

ONE STEP AHEAD, TWO STEPS BACK: REVERSE ENGINEERING THE SECOND DRAFT FOR THE THIRD REVISION OF THE CHINESE COPYRIGHT LAW

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I. INTRODUCTION.....	295
II. EXCLUSIVE OR REMUNERATIVE RIGHTS.....	298
III. LIMITATIONS AND EXCEPTIONS TO RIGHTS	300
IV. TECHNOLOGICAL MEASURES AND RIGHTS	
MANAGEMENT INFORMATION	303
V. MANAGEMENT OF RIGHTS	305
VI. ENFORCEMENT MEASURES	307
VII. CONCLUSION.....	308

I. INTRODUCTION

The Chinese Copyright Law, in its twenty-one-year history, has only been revised twice, in 2001 and 2010.¹ From its initial enactment to two revisions, foreign trade had always been an important consideration. In the 1980s, several rounds of Sino-U.S. intellectual property negotiation in the ambit of bilateral trade negotiation were the driving force for the promulgation of the Copyright Law in 1990.² In 2001, the Copyright Law was completely

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1. Jiamu Sun, SHEPPARD MULLIN RICHTER & HAMPTON LLP, *Draft Amendment to China's Copyright Law*, CHINA LAW UPDATE BLOG (May 30, 2012), <http://www.jdsupra.com/legalnews/draft-amendment-to-chinas-copyright-law-84502/> [hereinafter *Draft Amendment*].

2. See Hong Xue, *Between the Hammer and the Block: China's Intellectual*

revised to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") before China's accession to the World Trade Organization ("WTO").³ In 2010, the Copyright Law was revised for the second time to comply with the WTO Dispute Settlement Board Panel Report regarding the U.S.-China intellectual property dispute.⁴ Because the second revision merely covered the limited provisions addressed in the WTO dispute, the 2001 Copyright Law was largely kept intact.

The third revision, against the background of Chinese national strategy of indigenous innovation and arising economic power, will be a comprehensive revision. One primary purpose of the third revision is to improve the coherency of the Chinese copyright legal system, which consists of copyright law and a patchwork of regulations for implementation or interpretation of the copyright law, such as Implementing Regulations, Software Regulations, Regulations on the Right of Communication via an Information Network, and Collective Management Regulations.⁵

After two years of preparation, the National Copyright Administration of China ("NCAC") released a draft of the third

Property Rights in the Network Age, 2 U. OTTAWA L. & TECH. J. 291, 294–95 (2005) (explaining that, starting in 1979, the United States required in its bilateral agreements on technology, culture, and trade with China, that China incorporate specific provisions on protection of IP rights, initiating a process in which China would expand the scope of its IP rights and strengthen its enforcement of those rights).

3. MUZHU SHEN, WTO AND CHINESE LEGISLATION (2002); *Draft Amendment*, *supra* note 1.

4. *Draft Amendment*, *supra* note 1. Cf. Hong Xue, *An Anatomical Study of the United States Versus China at the World Trade Organisation on Intellectual Property Enforcement*, 31 EUR. INTELL. PROP. REV. 292, 298 (2009) (recounting that, according to the WTO Dispute Settlement Board Panel Report, China failed to uphold its obligations under the Berne Convention and the TRIPS Agreement when its Copyright Law denied protection to creative works of authorship that had not been authorized for, or were otherwise prohibited from, publication or dissemination within China).

5. See *A Brief Explanation Concerning the "Copyright Law of the People's Republic of China" (Revision Draft)*, CHINA COPYRIGHT & MEDIA (Apr. 6, 2012), <http://chinacopyrightandmedia.wordpress.com/2012/04/06/a-brief-explanation-concerning-the-copyright-law-of-the-peoples-republic-of-china-revision-draft/> (explaining that the National Copyright Administration of China made changes to its Copyright Law in order to consolidate the copyright law regime and its accompanying administrative regulations).

revision for public consultation on March 31, 2012.⁶ The draft immediately attracted public attention and became a media focus. The NCAC received more than 1,600 comments within two months.⁷ Although collecting societies, musicians, Internet industry workers, and many other stakeholders all keenly presented their propositions, the people at large who actually use the works were the silent majority for lack of knowledge, channels of communication, or awareness.⁸ Missing from the loud voices is a candid and critical review of the people's access to knowledge.

On July 6, 2012, the NCAC released the second draft, in which eighty-one provisions were changed from the first draft.⁹ The second draft does contain a few improvements, but they are offset by compromises and even steps backward made under the pressure of interest groups.¹⁰ It is unfortunate that China, the largest country by

6. NAT'L COPYRIGHT ADMIN. OF CHINA, *Copyright Law of the People's Republic of China (draft revision of) public comment* (Mar. 31, 2012), available at www.ncac.gov.cn/cms/html/309/3502/201203/740608.html.

7. See Leslie Pappas, *China Hears Music, Issues Second Draft of Copyright Law*, BLOOMBERG (July 12, 2012), <http://www.bna.com/china-hears-music-n12884910625/> (reporting that the NCAC made several changes to the second draft after receiving more than 1,600 comments during a thirty-day comment period, including those from songwriters within China's music industry that called the draft "a possible deprivation of music writers' copyright interests").

8. "I Must Protect You": *The Draft of the Revision of Copyright Law in the Middle of Contention*, INFZM.COM (Apr. 20, 2012, 10:32 AM), <http://www.infzm.com/content/74392>; *The Draft of the Revision of Copyright Law Questioned and Suspected*, SINA.COM (Apr. 4, 2012, 4:07 PM), <http://topic.t.sina.com.cn/blog/zzqf/index.shtml>.

9. See *Revision Made to up to 81 Articles in the Second Version of the Draft Amendment of China's Copyright Law*, INTELL. PROP. PROT. IN CHINA (July 2, 2012, 4:36 PM), http://www.chinaipr.gov.cn/frontierarticle/frontier/201207/1669207_1.html (highlighting that several ministries, commissions, academic and research institutions, administrative departments, public entities, and governmental departments made recommendations covering up to 81 articles in the second version of the draft amendment of China's Copyright Law).

10. See, e.g., *China Listens to Musicians and Issues a Second Draft of Copyright Law Revision*, MUSIC LAW UPDATES (Aug. 2012), <http://www.musiclawupdates.com/?p=5048> (last visited Aug. 16, 2012) (reporting that China modified its Copyright Law by (1) removing the requirement to register for copyright if statutory damages were to apply, (2) imposing some liability onto Internet service providers that either infringe upon copyrights or help others to infringe upon copyrights, and (3) dropping article 46 altogether after Chinese musicians claimed that the article allowed record producers to use another artist's

both population and Internet users, despite its fast-growing economy, seems to be missing opportunities to craft a twenty-first-century copyright law. Instead, China follows the old paths of “the more the better” (the more copyright protection and enforcement, the better economic growth and social development), one size fits all, and modeling U.S. law (draconic enforcement rather than general and robust limitations and exceptions).¹¹ This article will try to look into the inner design of the second draft and analyze both its improvements and setbacks.

II. EXCLUSIVE OR REMUNERATIVE RIGHTS

The second draft, consistent with the first draft, expands and strengthens the scope and substance of rights. The second draft degrades the *droit de suite* that was added in the first draft from an exclusive right of copyright owners to a right of remuneration.¹² But it is unclear why such a right that has no tradition in China and is not

music without obtaining consent so long as the work had been published for more than three months); *see also* Yuan Ye, *Singing the Blues*, NEWS CHINA MAG., July 2012, <http://www.newschinamag.com/magazine/singing-the-blues/> (citing concerns that, although the draft revision claims to protect copyright owners, articles 60 and 70 of the Copyright Law readjust profit shares of collective management organizations and strengthen their monopolies within the music industry while ignoring the rights of the creators of artistic content).

11. *See* Hong Xue, *Les Fleurs du Mal: A Critique of the Legal Transplant in Chinese Internet Copyright Protection*, 34 RUTGERS COMPUTER & TECH. L.J. 168, 172–74, 183, 204–06 (2007) [hereinafter Xue, *Critique*] (arguing that the copyright protections, exceptions, and limitations transplanted from the U.S. Digital Millennium Copyright Act to the Chinese Internet Copyright Regulations, one of the administrative arms of the Chinese Copyright Law, have greatly restricted the public’s freedom to use protected works).

12. NAT’L COPYRIGHT ADMIN., Third Revision of the Copyright Laws, Second Draft, art. 12 (2012) (China) [hereinafter Third Revision, Second Draft], *available at* <http://www.chinaiplawyer.com/edition-china-copyright-laws-exposure-draft/> (stating that either copyright owners or their successors, after the first sale of original artistic or photographic works or manuscripts of literary or musical works, enjoy the right to share the benefit from the re-sales in the form of auction of the originals or manuscripts, and that the right cannot be transferred or waived); *see* NAT’L COPYRIGHT ADMIN. OF CHINA, CIRCULAR ON SOLICITATION OF PUBLIC COMMENTS ON THE SECOND DRAFT OF THE THIRD REVISION OF THE COPYRIGHT LAW (July 9, 2012), *available at* www.ncac.gov.cn/cms/html/309/3517/201207/759867.html [hereinafter NCAC CIRCULAR] (clarifying that the “droit de suite,” or right to pursuit, falls under the right to receive remuneration, and that the scope of the right to pursuit is limited to sales through auction or sub-selling activities).

required by any international law should be introduced into Chinese copyright law. More worrisome, such a right can neither be transferred nor waived.¹³ It is indeed questionable whether such design would prevent the relevant works from entering into the public domain and whether the new remuneration right would increase the costs of enforcement.

Given that the phonogram industry is losing revenue from reproduction and distribution of hard copies, the first draft allowed for phonogram producers, along with performers, to be reasonably remunerated for broadcasting or diffusing the sound recordings by other means.¹⁴ Phonogram producers and performers have no broadcasting or diffusion rights under the current copyright law.¹⁵ It was not clear, under the first draft, whether the new right granted to the phonogram industry is an exclusive right or merely a remuneration right. The second draft clarifies that such a right is a remuneration right, and it reduces the scope of the right to certain means of diffusion.¹⁶ The clarification and reduction should be welcome, but it still tends to sustain the outdated business model of the phonogram industry.

The first draft redefines the scope of rights of broadcasting organizations and grants them the exclusive right to control the “signals with contents,”¹⁷ which implies that broadcasting

13. Third Revision, Second Draft, *supra* note 12, art. 12.

14. NCAC CIRCULAR, *supra* note 12.

15. Copyright Law of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 22, 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 159 (China), *available at* 2010 China Law LEXIS 1385 (stipulating that phonograms may be broadcasted or disseminated without permission from or remuneration to performers or producers of sound recordings).

16. Third Revision, Second Draft, *supra* note 12, art. 39 (clarifying that sound recording producers and performers enjoy the right of remuneration where the sound record is used in the following ways: a) public dissemination or re-diffusion of the sound recording by wire or wireless means, or communication to the public of the diffusion of the sound recording via technical equipment; and b) public dissemination of the sound recording via technical equipment).

17. *See generally* NAT'L COPYRIGHT ADMIN., Third Revision of the Copyright Laws, First Draft, art. 37 (2012) (China) [hereinafter Third Revision, First Draft], *available at* <http://www.chinaiplawyer.com/comparison-1st-2nd-exposure-draft-chinese-copyright-law/> (defining radio and television programs as those referring to signals transmitted for the first time by radio stations and television stations that

organizations may control both the signals and contents therein. The second draft, however, clarifies that broadcasting organizations' right is only in the signals that carry sounds or graphs.¹⁸

Like the first draft, the second draft prevents the property rights in a work whose author is an entity and has no legitimate successor from entering the public domain. In such a case, the property rights in the terms of protection shall be granted to the state.¹⁹

III. LIMITATIONS AND EXCEPTIONS TO RIGHTS

Limitations and exceptions are not only important to balance the public interests and private interests of rights holders but are essential to achieve the fundamental purpose of copyright protection. The first draft, however, either fails to remove the unreasonable restrictions on limitations and exceptions in the current copyright law or subjects them to new conditions that further restrict their implementation. The second draft makes improvements to some extent but meanwhile tightens the scope of limitations and exceptions.

Chinese copyright law incorporates the three-step test from the Berne Convention and TRIPS Agreement.²⁰ But the three-step test is meant to be a ceiling of all the limitations and exceptions, not a general clause to enable more limitations and exceptions.²¹ A policy document published by the Supreme People's Court of China at the end of 2011, however, stated that, in the necessary circumstances to stimulate technical innovation and commercial development, an act

carry content).

18. Third Revision, Second Draft, *supra* note 12, art. 40 (stipulating that broadcasting programs are the signals that carry sounds or graphs and first diffused by radio and television stations); *id.* art. 41 (defining radio and television stations as those that enjoy rights over broadcasting programs).

19. *Id.* art. 23.

20. Yong Wan, *Legal Protection of Performers' Rights in the Chinese Copyright Law*, 56 J. COPYRIGHT SOC'Y U.S.A. 669, 692 (2008) (outlining that, in the three-step test specified within the Implementing Regulations, an exception of limitation (1) may only cover certain special cases, (2) must not conflict with a normal exploitation of the works or objects of related rights, and (3) must not unreasonably prejudice the legitimate interest of the rights of owners of copyrights).

21. CHENGSI ZHENG, COPYRIGHT LAW (2d ed., 1997).

that would neither conflict with the normal use of the work nor unreasonably prejudice the legitimate interest of the author may be deemed “fair use” [“合理使用”], provided that the purpose and character of the use of work, nature of the work, amount and substantiality of the portion taken, and effect of the use upon the potential market and value have been taken into account.²²

The Supreme People’s Court’s opinion could promote “fair use” in China. Even if a particular use of a work is not among those allowable circumstances specified under the copyright law, it may still be available for use without the permission of the rights holder. The first draft, unfortunately, followed the old track by limiting the three-step test to circumstances permitted by the copyright law and excluded the possibility of an open-ended list of limitations and exceptions.²³ The second draft, however, enhances flexibility of the specified circumstances by adding an open-ended clause—“other circumstances”—provided that those circumstances are consistent with the three-step test.²⁴ This means that legitimately exempted use is no longer constrained to the exhausted list in the Copyright Law but becomes more open and flexible.

The open-ended clause in the second draft, however, does not solve all the problems relating to limitations and exceptions. The current copyright law maintains two closed lists of limitations and exceptions, i.e., unpaid use and compulsory (statutory) licensing.²⁵

22. Circular of the Supreme People’s Court on Issuing the Opinions on Exerting the Function of Intellectual Property Rights Judgment in Facilitating Socialist Cultural Development and Prosperity and Promoting Independent and Coordinated Economic Development (promulgated by the Sup. People’s Ct., Dec. 16, 2011, effective Dec. 16, 2011) SUP. PEOPLE’S CT. GAZ., Dec. 16, 2011, at 16 (China), *available at* 2011 China Law LEXIS 1536 (referring to fair use as “rational use”).

23. Third Revision, First Draft, *supra* note 17, art. 39 (stipulating that, as permitted by the Copyright Law, those individuals using already-published works without the permission of the copyright holders of those works may not influence the regular use of the works or unreasonably infringe the lawful rights and interests of the rights holder).

24. Third Revision, Second Draft, *supra* note 12, art. 42 (stating that, when using works in ways provided by the previous paragraph, it is prohibited to influence the regular use of the work, and it is prohibited to unreasonably harm the lawful rights and interests of the copyright holder).

25. Copyright Law of China (promulgated by the Standing Comm. of the Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 1, 2010), arts. 22, 24, 2010

With respect to unpaid use, the second draft keeps all existing circumstances specified in the Copyright Law and Software Regulations.²⁶ Yet the second draft, like the first draft, adds new restrictions on certain specified unpaid uses,²⁷ the most significant of which is on “private use.” According to the Copyright Law, anyone may use a work for personal study, research, and appreciation.²⁸ The first draft, however, restricts the scope of private use to “making one copy of a work for personal study and research.”²⁹ The second draft further restricts the scope to “reproduction of fragments of a literary work for personal study and research.”³⁰ The distinction of private use and personal “appreciation” is unhelpful, especially because it is inherently difficult to distinguish between personal study and research, particularly on the Internet.

It is even more worrisome to restrict private use to reproduction of a literary work. Under the copyright law, any category of works may be used in the form of reproduction, translation, adaptation (such as remix or sampling), and so forth, as long as the use is private.³¹ The second draft, however, only allows for reproduction of literary works. It is unclear why copyright protection that should primarily address public use of works interferes so harshly in the private sphere. While adding new restrictions, the second draft is willing to keep the old ones. The use of works for classroom education and scientific research is generally restrictive.³² Only translation or reproduction in limited copies is allowed. Most unacceptably, the translated or reproduced copies can only be used by teachers or

STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter Copyright Law of China], *available at* 2010 China Law LEXIS 1385 (providing lists for circumstances in which a work may be used either without compensation to the copyright owner or with permission from a licensing contract).

26. Third Revision, Second Draft, *supra* note 12, art. 45 (stipulating that the only new unpaid use introduced is to allow the copying of interoperable information of a computer program to create a new program).

27. *Id.* art. 42.

28. Copyright Law of China, *supra* note 25, art. 22(1).

29. Third Revision, First Draft, *supra* note 17, art. 40(1).

30. Third Revision, Second Draft, *supra* note 12, art. 42(1).

31. Copyright Law of China, *supra* note 25, art. 22(6) (articulating that translation or reproduction in a small quantity of copies is permissible provided that neither is published for distribution).

32. *Id.*

researchers, rather than students.³³ So, under the Chinese law, all the “distributed materials” (“DMs”) to students who receive classroom education must be subject to both copyright license and payment. The second draft, like the first draft, does not make an effort to correct the restrictions on educational use.

Pursuant to compulsory licenses, a protected work may be used under the Copyright Law without the permission of the rights holder, but it is subject to the payment of remuneration.³⁴ The first draft maintains the existing categories of statutory licensing but makes the implementation more restrictive. For example, the Copyright Law, pursuant to the Berne Convention, allows for the creation of new sound recordings for a musical work that has been incorporated into sound recordings without the permission of the copyright holder.³⁵ The first draft, however, adds a time limit: new sound recordings cannot be made until three months after the initial release of the recording.³⁶ Interestingly, the Chinese musician community strongly criticized this provision in the first draft for fear that their musical work could be put to any use after three months. In response, the second draft completely eliminates the compulsory licenses necessary for making sound recordings and broadcasting.³⁷ The second draft instead shifts the power to the collecting societies. Under the second draft, anyone, before the first use of the work, shall register with the pertinent collecting society and pay remunerations to it within one month after use.³⁸ It is unknown whether procedural complications would deter individuals from using the works under the limited circumstances of compulsory licensing.

IV. TECHNOLOGICAL MEASURES AND RIGHTS MANAGEMENT INFORMATION

The draft significantly strengthens the protection for technological

33. *Id.*

34. *Id.* arts. 23, 33, 40, 43, 44.

35. *Id.* art. 40.

36. Third Revision, First Draft, *supra* note 17, art. 46.

37. NCAC CIRCULAR, *supra* note 12; Third Revision, Second Draft, *supra* note 12, arts. 46–47.

38. Third Revision, Second Draft, *supra* note 12, art. 46.

measures and rights management information.³⁹ Although China has joined the World Intellectual Property Organization (“WIPO”) Internet treaties, the legal protection available in the drafts is much more than what’s required by the treaties but comparable to the U.S. Digital Millennium Copyright Act (“DMCA”).⁴⁰ Under the second draft, technological measures are defined as the effective technology, device, or component deployed by a rights holder to prevent or restrict its work, performance, sound recording, or broadcasting program from being copied, browsed, appreciated, operated, or communicated via an information network.⁴¹ The second draft clearly extends the same legal protection that broadcasting programs enjoy to technological measures—a protection that has not been reflected in any international treaty and may have a negative impact. Growing use of technological measures by the media industry could exclude open licensing. Even where a work is made available by its author under Creative Commons, users still may not circumvent the Technological Protection Measures attached to the copies of the work by the publishing or phonogram industries.⁴²

The legal protection for technological measures and rights management information offered by the second draft closely models the DMCA by banning the devices or services that may be used for copyright circumvention or to tamper with the work’s rights management information.⁴³ With respect to the former, there is no requirement for double intents. As far as circumvention of technological measures is intentional, the circumventor shall be punished, irrespective of whether the circumventor intended to infringe the right protected by the technological measure.⁴⁴ With

39. Xue, *Critique*, *supra* note 11, at 172, 173–74 (noting that the first draft largely incorporates the “copy-and-paste” provisions from 2006 Regulations on Protection of Right of Communication via Information Network (known as the Internet Copyright Regulations), which are inherently unbalanced and unreasonable).

40. *Id.* at 172–73, 176–78, 182, 186 (providing several clear examples in which the Internet Copyright Regulations follow the DMCA model).

41. Third Revision, Second Draft, *supra* note 12, art. 64.

42. *Id.* arts. 65, 66.

43. *Id.*

44. *See id.* art. 65 (stipulating that no organization or individual may willfully avoid or destroy technological protection measures or willfully provide technological services to other persons to avoid or destroy technological protection

respect to the latter, negligent as well as intentional acts of deletion or alteration of rights management information shall be punished.⁴⁵

In the second draft, only under four very restrictive circumstances can technological measures be legitimately circumvented, provided that no technology, device, or component for circumvention is shared with any others.⁴⁶ Violations against the protection for technological measures and rights management information are subject not only to civil liabilities but also to severe administrative and criminal punishments.⁴⁷

The biggest defect in this regard is that the second draft fails to address whether technological measures may be circumvented for the specified circumstances of limitations and exceptions to rights.⁴⁸ For example, it is unclear under the second draft whether a user may circumvent a copy protection measure on a work so as to make a single copy of a work for personal study or research. During the drafting of this article, this author had been persistently suggesting that copyright limitations and exceptions must be taken into account to prevent rights holders from “locking up” legitimate uses of the works. Unfortunately, the voice was bounced back by the sound of silence.

V. MANAGEMENT OF RIGHTS

The first draft created a de facto collective management for “orphan works,” although the ambiguity and restriction in these designs may detract from their effectiveness.⁴⁹ The second draft,

measures).

45. *See id.* art. 66 (stating that, without permission of the rights holder, one may not provide works, performances, or audio products to the public of which it is known or should be known that the rights management information has been deleted or changed without permission of the rights holder).

46. *Id.* art. 67.

47. *Id.* art. 74 (providing that the administrative copyright department may impose a warning; confiscate unlawful income or devices; confiscate materials, tools, and equipment; impose a fine; or render the unlawful party subject to criminal responsibility).

48. *See generally id.* arts. 65, 67 (omitting any mention of limitations or exceptions in its lists of instances in which technological protection measures may or may not be avoided).

49. *See* Third Revision, First Draft, *supra* note 17, art. 25 (stating that a work whose author cannot be identified or found after diligent search may be used, provided that licensing fees are submitted to the NCAC). The first draft calls for a

while retaining the design for orphan works, limits the scope of its application. Under the second draft, copyright in a work for which the author cannot be identified, except for the right of attribution, may be exercised by the owner of the original work. Where a newspaper or journal digitizes the works that have been published in the newspaper or journal, or where other users digitize or communicate works via information networks, these users may apply with, and pay fees to, the organization designated by the NCAC, provided that neither the author nor the owner of the original work can be identified or contacted.⁵⁰

The first draft had substantially bolstered the status and power of collecting societies, which represent not only their members but also any other Chinese rights holders who did not, in advance, object to their representation in writing. Once users pay a collecting society, they are exempted from having to compensate the rights holders.⁵¹ These provisions were strongly opposed by the right holders who are suspicious of the officially designated collecting societies. As a result, the provisions on collective management were revamped considerably in the second draft. In the second draft, the much-debated “extended (default) collective management” clause is now only applied in two circumstances: broadcast of published literary, musical, artistic, or photographic works by radio or television stations, and public communication of music or audiovisual works via karaoke systems.⁵² Additionally, extended collective management, under the second draft, does not exempt the users from having to compensate the rights holders, even if they also had to pay the collecting society.⁵³ Furthermore, if a user knows that the rights holder is not a member of a collecting society, she cannot rely on the fee schedules set out by the collecting society if sued by the rights holder for unauthorized use, even though she had paid the collecting society.⁵⁴

Reinforcement of collecting societies would inevitably curb the development of open licensing in the form of a creative commons in

new set of regulations to define the new system.

50. Third Revision, Second Draft, *supra* note 12, arts. 25–26.

51. Third Revision, First Draft, *supra* note 17, arts. 60, 70.

52. Third Revision, Second Draft, *supra* note 12, art. 60.

53. *Id.* art. 70.

54. *Id.*

China. Collective management, particularly the “extended (default) collective management,” makes many creators’ rights non-waivable.⁵⁵ Even if a creator is willing to adopt open licensing for his or her work, the collecting society still holds remuneration rights. The first and second drafts move toward this direction. At this point, China is moving toward the Nordic model. The difficulty lies in determining how the Nordic model manages open licensing.⁵⁶

VI. ENFORCEMENT MEASURES

Copyright enforcement is tremendously enhanced under the first and second drafts. Regarding civil remedies, damages could be several times that of licensing fees if the rights holder’s actual loss and the infringer’s illegal gains cannot be determined.⁵⁷ The second draft also introduces semi-statutory damages of up to RMB 1 million (USD \$156,799), where the rights holder’s actual loss, infringer’s illegal gains, or usual right transaction fees cannot be determined. However, unlike the first draft, the second draft removes the prerequisite that captioned copyright shall be registered with the NCAC.⁵⁸ Determination of damages is now solely within the court’s discretion. Repeated infringers may be required to pay seemingly punitive damages. With respect to administrative enforcement, the draft expands the scope of administrative punishments and grants copyright authorities the ability to investigate, including the detention and seizure of suspected goods.⁵⁹

The Internet poses a large challenge for copyright enforcement. The second draft specifically addresses this issue. Under the second

55. Cf. Laurence R. Helfer, *Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 75, 97–98 (Daniel Gervais ed., 2d ed. 2010) (arguing that the rise of Creative Commons and similar organizations advocating for open licensing would challenge the economic interests of collective management organizations and would raise human rights concerns for creators and users).

56. See *id.* at 98 (claiming that, even though creators would not be required to participate in the Scandinavian model if they were to opt out of or veto the use of their works, the burden would be placed on creators to exclude their works from the collective).

57. Third Revision, Second Draft, *supra* note 12, art. 72.

58. *Id.*

59. *Id.* arts. 73–76.

draft, network service providers that provide “pure network technical services” such as storage, search, or linking are not obliged to examine relevant copyright or related rights.⁶⁰ This provision exempts the service providers’ general obligation of monitoring their systems or networks and importantly differentiates from the service providers’ general obligation of content censorship.⁶¹

Unfortunately, the second draft fails to address the problem of service providers having to provide their users’ or subscribers’ personal information when approached by rights holders, which undermines privacy and personal data protection on the Internet. According to the Supreme People’s Court’s judicial guidelines, service providers that refuse, without justifiable reason, to provide users’ personal information at the request of copyright holders shall be liable to the copyright holder.⁶² These guidelines, which are applied in Chinese judicial proceedings, hardly provide any safeguard against the abuse of Internet users’ personal information. On the other hand, the Ministry of Industry and Information Technology enacted at the end of 2011 a set of stipulations, which prohibits network service providers from sharing users’ personal information with third parties without the consent of the users.⁶³ The second draft’s silence on the critical issue of privacy protection would result in discrepancies in the enforcement.

VII. CONCLUSION

Unlike the first two revisions to the Copyright Law, the third revision was not made under imminent trade pressure, such as from

60. *Id.* art. 69.

61. Administrative Measures for Information Services (promulgated by the Ministry of Info. Indus., Sept. 25, 2000, effective Sept. 25, 2000), arts. 15–16, (China), *available at* 2000 China Law LEXIS 1690 (providing that all service providers shall censor the contents in their network or system according to legal requirements).

62. Interpretations of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network (promulgated by the Sup. People’s Ct. Gaz., Nov. 20, 2006, effective Nov. 20, 2006) SUP. PEOPLE’S CT. GAZ., Nov. 20, 2006, art. 5 (China), *available at* 2006 China Law LEXIS 8163.

63. Several Provisions on Regulation of the Order of Information Service Market (promulgated by the Ministry of Indus. & Info. Tech., Dec. 29, 2011, effective Mar. 15, 2012), arts. 11–12, *available at* 2011 China Law LEXIS 1520.

bilateral or multilateral trade agreements. Instead, the third revision is like a test stone of Chinese national strategy of indigenous innovation. The national strategy seeks to shape China's development into an innovative, IP-intensive economy primarily through stimulating more intellectual property rights developed and owned by Chinese individuals.⁶⁴ The drafts, therefore, tend to upgrade the level of protection and enforcement for copyright to implement the national strategy. In addition, the drafts show the belief that legal protection should keep pace with economic development—since China is the second largest economy in the world and business models are moving from imitation to independent creation and copyright protection that are comparable with that in developed countries.⁶⁵ However, the presumptions on which the drafts were built may be untenable. Firstly, it may wrongly estimate the Chinese economic development stage. Despite its huge size, the Chinese economy is still working to adapt to the Western model. Incommensurate protection and severe enforcement for copyright can only curb, rather than stimulate, creation and innovation. Additionally, even where a copyright-heavy society may have succeeded, it has hardly been successful in the information society and network environment. The old path of copyright protection does not work in the new communication environment.

The first and second drafts are the first few steps in the long process of legal revision. After public consultation, the improved draft will be submitted to the Standing Committee of the National People's Congress, the highest legislature, for examination and approval.⁶⁶ The third revision of China's Trademark Law has been going on for more than five years and is still under construction.⁶⁷

64. Cf. John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT'L ECON. L. 735, 736 (1999) (claiming that encouraging technological research, development, and commercialization through effective government policies is a necessary condition for the advancement of China's developing economy).

65. Cf. *id.* at 736–37 (purporting that, from the perspective of a developing country like China, all developed nations have well-developed patent systems, and for China to be a true participant in the global market economy, it must develop a robust patent system).

66. See Pappas, *supra* note 7 (reporting that the National People's Congress will have the “final say” about the copyright law reform).

67. Huang Hui & Paul Ranjard, *Trademark Law Revision: More Work Needed*,

The Copyright Law revision is not likely to take much less time than that. The draft should be modified and improved after public consultation. This author, along with other scholars home and abroad, is currently campaigning for a general exception clause, a non-exhaustive illustrative list, and other new exceptions such as format shifting that are important for a network environment.